



*Office Of The City Attorney*

*H. Taylor Williams, IV*

From: H. Taylor Williams, IV, City Attorney

To: Members of City Council

Date: February 22, 2013

## **SPSA Post 2018: Update**

Recently, you received a Memorandum dated December 5, 2012 and heard a presentation at the December 10, 2012 City Council Meeting on SPSA Post 2018. This update seeks to pick up where that memo and presentation stopped. You may want to refresh your understanding of what was said in that memo.

The Technical Committee met again on January 24, 2013 to consider terms to go in a proposed non-binding resolution for individual jurisdictions to adopt. A copy of the proposed Resolution is attached for your review. You are not being asked to consider adoption of this Resolution or any similar form of the Resolution at this time.

I would like to provide you with my observations and conclusions about the 14 “resolves” beginning on page 3 at line 105.

Line 105, 1. There was discussion about trying to change the current process for appointing members to the board. That discussion was dropped in favor of the language you see. I have no concerns with the proposed language.

Line 109, 2. I disagree with the idea that membership in SPSA is only open to those localities that enter into new Use and Support Agreements. Membership in SPSA is determined by the Articles of Incorporation and controlled by the By-Laws. Neither requires the execution of a Use and Support Agreement by any incorporating political subdivision to be a member of the Authority. The Articles of Incorporation were initially executed January 24, 1973 and were amended January 15, 1976 and amended again on July 15, 1983. In each instance the language is the same; “The Authority may contract with the incorporating political subdivisions ...” I don’t find any state statute in the Virginia Water and Waste Authorities Act that conditions membership in an authority on signing a Use and Support Agreement. Furthermore, there are specific things a member must do to withdraw from an authority defined in Va. Code Section 15.2 – 5112 (A) and 2000 Acts of Assembly, Chapter 596 S2. It is my opinion that Franklin continues to be a member of SPSA even if it is not a customer (by signing a Use and Support Agreement) with representation on the board until it seeks to withdraw from membership by complying with the statutory process. Obviously the statutes can be amended to change the current laws. You may ask why Franklin might want to continue its membership in SPSA. At some point in the future Franklin may desire to sign a Use and Support Agreement and once again become a member. At some point SPSA may terminate its existence as an authority and there would be a possible distribution of assets to the members.

Line 113, 3. Franklin had advocated for the creation of two divisions, an east division to consist of the Cities of Chesapeake, Norfolk, Portsmouth, Suffolk and Virginia Beach and a west division to consist of the City of Franklin and the Counties of Isle of Wight and Southampton. These divisions recognize the different methods used to dispose of waste between the two divisions. This difference would allow each division to have a tipping fee that is consistent with the method of disposal of the waste and is fair and reasonable. This is a watered down version of what was proposed. Previously there had been an acceptance of an east division and a west division. I do not have an explanation of why the change in language. I cannot say whether this impacts the goal of divisions based upon the method of waste disposal.

Line 121, 4. I have no comment on this proposal presuming there will be divisions.

Line 128, 5. It has been agreed that all members will pay a tipping fee for services. I had objected to the language struck through saying tipping fees would be equal. I have no objection to the language on the assumption that there will be divisions

based upon the manner of waste disposal and that tipping fees for the divisions will be equal for members within the divisions but the tipping fees for the different divisions would not necessarily be equal as a reflection of the different manner of waste disposal.

Line 132, 6. The original proposed language was modified to recognize that a SPSA member currently can withdraw from SPSA but for the fact that the Use and Support Agreement holds every member to the Authority by contract. This modification allows for the termination of the Use and Support Agreement itself but I would further be cautious and say we cannot allow the Use and Support Agreement to include language as a “written obligation” that makes termination and withdrawal overly burdensome.

Line 138, 7. I see no problem with this language as long as the SPSA board does not emphasize “environmentally best disposal method” as the only method for different divisions which places an undue financial burden on the members within the division.

Line 142, 8. My concerns are the same as stated above in 7. This language actually contemplates the decision being made prior to the execution of the Use and Support Agreement which allows a member to refuse to execute a Use and Support Agreement if it does not agree with percentages and types of solid waste. May be similar language can be taken from here and added to 7 as a protection against the concern I have there.

Line 145, 9. It is beneficial to know how far the landfill can be expanded, what would be the conditions imposed by Suffolk for granting a permit and the proposed cost of the expansion prior to signing a Use and Agreement. This may cause SPSA to incur some upfront expense not included in the budget at this time. But the expense may prove invaluable in an evaluation to determine ultimate costs to be a member of SPSA if the landfill is to be expanded. One projection of cost was \$59 million dollars.

Line 149, 10. There is no rhyme or reason to the current ownership of transfer stations. The existing transfer stations are designed and built to be different to accommodate the volume of trash anticipated to come across the floor and meet the varied needs of different communities. Franklin shares a transfer station with Southampton County on Route 671 approximately 2 miles west of Franklin. Staff in Franklin feels that it is essential to keep that station as a delivery point for

Franklin's residential waste. Without that station, Franklin would need to build a transfer station in Franklin. Where to locate the transfer station in Franklin could be a controversial issue. Operating our own transfer station would not be cost efficient. Co-ownership and cost sharing with Southampton County would appear to be a much better option. At present, SPSA owns the land and all the improvements at the transfer station. Hopefully Franklin and Southampton County would seek joint ownership of the station.

Line 154, 11. This provision has been suggested by Virginia Beach. Virginia Beach wants to move its transfer station in the Landstown area because it is no longer compatible with other commercial, business and education uses in the area. The concern is that there seems to be no benefit to Franklin in this proposal. Franklin does not need "financing for the construction of new, relocated, revitalized or expanded existing transfer stations." If this proposal is kept in the resolution it has the potential to add to SPSA'S capital debt in the amount of \$25 million dollars for the east members and nothing for the west members. Yet the west members may have their tipping fee influenced to pay for a portion of the capital expenses for the benefit of the east communities. I would suggest modifying the proposal in some fashion to limit the \$25 million offer to the east members and have that \$25 million dollar debt assigned to the tipping fee of the east communities so that they pay for what they want. What it really amounts to is an indirect tax on the east members to finance new transfer stations that won't be apparent to the citizens.

Line 163, 12. Payment of a host fee to the City of Suffolk has generated much conversation. Suffolk residents have not had to pay any tipping fee for residential trash disposal since SPSA began receiving trash. It has been a firm point for all other members to say everyone will pay equal tipping, including Suffolk. Generally, my research shows that communities which host private landfills receive free or reduced tipping and a host fee. The private owner builds those costs in to its tipping fee charged to other users. Suffolk has not previously received a host fee in addition to the free tipping for residential trash. The discussion has been to create a host fee to be paid to Suffolk, per ton of trash delivered to the regional landfill. The discussion generally also includes a cap on the amount of host fees received so that Suffolk does not become a financial burden to the other members again. The method of calculating a host fee or an annual amount has not yet been settled. I expect it will be part of the "conditions" for obtaining the use permit necessary to expand the landfill.

Line 167, 13. In recent years, SPSA has eliminated some disposal services that were not efficient and self supporting. There is a request among some eastern members to have SPSA resume some of the services and the cost be allocated to the users of the service. I would suggest that Franklin support this idea.

Line 172, 14. This is a provision for emergency use. I would suggest that Franklin support this idea.

The regular monthly SPSA Board meeting is scheduled for Wednesday, February 27. A CAO meeting is scheduled for Thursday, February 28<sup>th</sup>. This proposed resolution is not on the SPSA Board agenda but will be a topic of discussion for the CAO's on Thursday.

My request is that the Council continues to listen to the results of the work of the technical committee and the CAO's and be open minded about SPSA as a continuing option for solid waste disposal for Franklin. We know the current tip fee is \$125 and should remain at that level through 2015 and see a reduction in the tip fee in 2016 and 2017. A new use and support agreement will come into effect after January 24, 2018. The tip fee should come down because all existing debt will be paid off. No one knows what the new tip fee might be post 2018 because of a number of variables such as:

- a.) What will be the result of negotiations with Wheelabrator for a new contract to receive processible waste at the WTE plant?
- b.) How many members will opt to enter into a new use and support agreements?
- c.) What will be the new SPSA capital debt associated with expanding the regional landfill to its full capacity?

Respectfully submitted,

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City Attorney